

117172
DECISION



20402 *Kukpostich*
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-202296

DATE: December 29, 1981

MATTER OF: Betty Akin Holmes--Backpay--Retroactive
correction of grade

DIGEST: Because her qualifications had been incorrectly evaluated, employee was reassigned to another position in a different job series at grade GS-4 rather than the correct grade of GS-5, which she had held in her previous position. Employee is not entitled to retroactive promotion to GS-5 since the error did not prevent a personnel action from taking effect as originally intended, the employee was not deprived of a right granted by statute or regulation nor was a nondiscretionary agency regulation or policy violated.

In this decision, we find that the claimant, Mrs. Betty Akin Holmes, employed by the Social Security Administration, Department of Health and Human Services, is not entitled to compensation under the Back Pay Act for retroactive correction of her grade to a higher level.

Mrs. Holmes had been a Secretary, at grade GS-5, step 3. She applied for a Service Representative position and on January 27, 1977, she was reassigned to the new job series at grade GS-4, step 4. Initially, she was informed that in the new job series she could not qualify for grade GS-5 and that she was required to begin at GS-4 in a career ladder progression from that grade through grades GS-5, 6, and 7. She signed a statement agreeing to accept the Service Representative position at grade GS-4 under the impression she could not qualify as a GS-5. It was later determined that she could have been transferred to the Service Representative position at grade GS-5, step 3. A mistake had been made in evaluating her qualifying experience, and as a result she was erroneously assigned the GS-4 position. Upon review of her records, she was credited with one additional year of general experience she had gained on a previous job and effective February 13, 1977, she was promoted to GS-5, step 3.

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Mrs. Holmes believes that the personnel action reducing her grade to GS-4 should be corrected and that her promotion to GS-5 should be made effective January 27, 1977, since she was then eligible for that grade on the basis of the additional year of general experience that had been incorrectly assessed. She bases her claim on the Back Pay Act, 5 U.S.C. § 5596, which provides for retroactive pay upon correction of an unjustified or unwarranted personnel action, as well as on the guidelines implementing the Act in Chapter 550, Subchapter 8 of the Federal Personnel Manual. Because she does not view her claim as one for retroactive promotion, Mrs. Holmes questions the agency's view that her claim should be disallowed on the basis of our decision Maureen Barry, B-189678, December 21, 1977. She regards the agency's incorrect assessment of her prior experience as an unjustified or unwarranted personnel action that should be corrected under the Back Pay Act.

We held in the Barry case that a mistake in evaluating the qualifying experience of an employee for the purpose of a discretionary promotion is not the type of error justifying a retroactive promotion. We recently dealt with the same issue where the employee was to be reassigned to a position in another job series at either a higher grade or the same grade as her previous position, depending upon evaluation of her qualifying experience. See Barbara W. Scheaffer, B-200717, January 28, 1981, and Melissa T. LeSeur, B-200669, May 6, 1981. In these cases, we explained that not every error in the processing of personnel actions constitutes an unjustified or unwarranted personnel action for which the Back Pay Act provides a remedy. We have recognized as unjustified and unwarranted actions, clerical or administrative errors that (1) prevented a personnel action from taking effect as originally intended (2) deprived an employee of a right granted by statute or regulation, or (3) would result in failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively. In Scheaffer we stated:

"* * * Because promotions are discretionary, an error that occurs before the authorized official has had the opportunity to exercise

his discretion with respect to approval or disapproval does not establish an intent to promote at any particular time. After-the-fact statements by that official as to what would have been his determination had the error not occurred are not sufficient to establish the necessary intent. Janice Levy, B-190408, December 21, 1977."

On the other hand, by statute, regulation, or agency policy mandating promotion within a particular time frame or under specific conditions, the granting of a promotion may become nondiscretionary so as to warrant backpay. See Scheaffer, supra, and cases cited therein.

Mrs. Holmes' situation differs from that considered in Scheaffer and LeSeur only in that her reassignment involved a reduction in grade level. That distinction, however, does not dictate a different result. Our review of the Regional Merit Promotion Plan does not indicate that the agency had a regulation or policy mandating Mrs. Holmes' assignment at other than the entry grade of the new position simply because that reassignment involved a reduction in grade.

There is nothing in the present record to show that Mrs. Holmes' reassignment to a new job series was other than a discretionary action by agency officials. By letter of July 20, 1981, Mr. Curtis L. Dierdorff, Personnel Officer, Region 6, reported that the mistake in evaluating Mrs. Holmes' qualifications occurred before rather than after her selection, thereby causing the selecting official to choose her at the GS-4 grade level. She was rated as eligible for reassignment at that grade in September 1976. Her name was subsequently referred to the selecting official on the GS-4 best-qualified list dated October 29, 1976.

Mrs. Holmes' reassignment to the Service Representative position was a discretionary matter and the error in evaluating her qualifications occurred before the official having authority to appoint her to the new position had acted. Consistent with the holdings discussed above, there is no basis to consider that error or her initial appointment at

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GS-4 an unjustified or unwarranted personnel action for the purpose of granting her backpay or otherwise establishing her entitlement to the GS-5 position to which she was subsequently promoted. Her claim is therefore denied.

For the

Harvey R. Van Cleave
Comptroller General
of the United States